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Malaysian Trustees Bhd v Pilecon Engineering Bhd

B HIGH COURT (SHAH ALAM) — ORIGINATING SUMMONS NO BA-24FC-32–01 OF 2018
WONG KIAN KHEONG J
28 JANUARY 2019

C *Land Law — Charge — Order for sale — Cause to contrary — Burden to prove — Stopping order for sale — Whether court shall order sale of charged land if defendant failed to discharge burden — Whether Form 16D shall comply with para 8A of the Tenth Schedule to the National Land Code — National Land Code ss 256(2) & 340*

D

This was an originating summons filed by the plaintiff company ('the trustee') to enforce the charge and an application for an order for sale pursuant to s 256(2) of the National Lade Code ('the NLC'). The defendant was granted facilities by 12 financial institutions (initial debt) which the defendant had E incurred debts to various creditors including the 12 financial institutions. Due to the defendant's inability to settle the initial debt, it underwent a scheme of arrangement under s 176 of the Companies Act 1965 ('arrangement scheme'). Pursuant to the arrangement scheme, the defendant issued 'Redeemable Convertible Secured Loan Stocks' ('RCSLS') with a nominal value of F RM120m to its secured creditors ('RCSLS holders'). The RCSLS were repayable on certain maturity dates ('repayment') which was secured by, among others charges registered under the National Land Code over various pieces of land owned by, among others the defendant. On 11 July 2013, the defendant, the trustee and RCSLS holders entered into a consent judgment regarding the G outstanding sum due under the RCSLS ('the first outstanding sum') by the defendant to the FI's ('consent judgement'). The defendant failed to pay the first outstanding sum pursuant to the consent judgment. On 5 March 2015, the defendant, trustee, FI's and two other companies entered into a settlement agreement ('the settlement agreement') which provided that the defendant and H the two companies would settle the first outstanding sum and expenses incurred by the FI's ('the settlement sum') on 19 December 2015 in a specific manner. The defendant and the two companies breached the settlement agreement by, among others, not completing the sale of the tranche sale properties and redemption of the redemption properties. The trustee issued I notices to the relevant parties to remedy the said breaches however they were not remedied and a notice was issued to terminate the settlement agreement. After the termination, two suits being: (a) Suit 125 to restrain Malayan Banking Bhd from presenting a petition to wind up the defendant; and (b) Suit 126 to set aside the consent judgment and settlement agreement, were filed in

the KL High Court which were still pending ('KL Suits'). A

Held, allowing the originating summons with costs:

(1) A registered charge is indefeasible under the second limb of s 340(1) of the NLC. The court should ascertain the terms and conditions of the charge agreement between the chargor and the chargee. There must be a breach of the charge agreement by the chargor and the chargee shall serve a notice to the chargor to remedy the breach vide Form 16D or Form 16E. If it is not remedied within the time stipulated the entire sum secured by the charge shall become due and payable to chargee and the chargee may file a charge action and apply for an order for sale on the charged land which should comply with O 83 of the Rules of Court 2012 (see para 18). B C

(2) In order to stop an order for sale from being given the chargor has the burden to satisfy the court that there is a 'cause to the contrary' within the meaning of s 256(3) of the NLC in which there are three categories being (a) the charge is defeasible under s 340(2)(a)–(c) and 4(b) of the NLC; (b) the charge has failed to comply with the conditions precedent for the filing of a charge action; and (c) an order for sale of the charged land is contrary to the rule of law or equity. If the chargor cannot discharge the burden the court shall order the sale of the charged land (see para 18). D E

(3) There was no requirement in the NLC for Form 16D to comply with para 8A as para 8A applied to an instrument of dealing, Form 16D was not an instrument of dealing, and Form 16D did not have to fulfil the attestation requirement and therefore could not be an instrument of dealing. Even if it was assumed that para 8A applied to Form 16D, the non-compliance of para 8A was of no consequence (see paras 26–27). F

[Bahasa Malaysia summary G

Ini merupakan saman pemula yang difailkan oleh plaintif ('pemegang amanah') untuk menguatkuasakan cagaran dan satu permohonan untuk perintah untuk menjual selaras dengan s 256(2) Kanun Tanah Negara ('KTN'). Defendan telah diberikan fasiliti 12 institusi kewangan ('hutang asal') yang mana defendan telah memperoleh hutang kepada beberapa pemberi hutang termasuk 12 institusi kewangan tersebut. Atas sebab ketidakupayaan defendan untuk membayar hutang asal, ianya telah menjalankan satu skim aturan di bawah s 176 Akta Syarikat 1965 ('skim perkiraan'). Selaras dengan skim perkiraan tersebut, defendan telah mengeluarkan 'Redeemable Convertible Secured Loan Stocks' ('RCSLS') dengan nilai nominal RM120 juta kepada si pemiutang bercagarnya ('pemegang RCSLS'). RCSLS tersebut kena dibayar balik pada waktu matang tertentu ('pembayaran semula') dijamin oleh, antara lain, cagaran yang didaftarkan di bawah Kanun Tanah Negara berkaitan beberapa hartanah yang dimiliki oleh, antara yang lain, defendan. H I

Pada 11 July 2013, defendan, pemegang amanah dan pemegang RCSLS telah memasukki satu penghakiman persetujuan berkaitan dengan jumlah tertunggak yang terhutang di bawah RCSLS ('jumlah hutang tertunggak pertama') oleh defendan kepada institusi keewangan tersebut ('penghakiman persetujuan'). Defendan gagal untuk membayar jumlah hutang tertunggak pertama selaras dengan penghakiman persetujuan. Pada 5 Mac 2015 defendan, pemegangan amanah, institusi keewangan, dan dua syarikat lain telah memasukki perjanjian penyelesaian ('perjanjian penyelesaian tersebut') yang memperuntukan bahawa defendan dan dua syarikat akan menyelesaikan jumlah tertunggak pertama dan perbelanjaan yang ditanggung oleh institusi kewangan ('jumlah penyelesaian') pada 19 Disember 2015 dalam cara yang spesifik. Defendan dan dua syarikat lain melanggar perjanjian penyelesaian, antara yang lain, dengan tidak melengkapkan penjualan hartanah *tranche sale* dan penebusan hartanah penebusan. Pemegang amanah mengeluarkan notis kepada pihak-pihak yang relevan untuk remedi pelanggaran tersebut namun ianya tidak diremedi dan satu notis telah dikeluarkan untuk menamatkan perjanjian persetujuan tersebut. Selepas penamatan, dua guaman iaitu: (a) Guaman 125 untuk menghalang Malayan Banking Bhd daripada mengemukakan petisyen untuk menggulung defendan; dan (b) Guaman 126 untuk mengetepikan penghakiman persetujuan dan perjanjian penyelesaian, difailkan di Mahkamah Tinggi Kuala Lumpur yang masih menantikan penyelesaian ('Guaman KL').

Diputuskan, membenarkan saman pemula dengan kos:

(1) Satu cagaran berdaftar tidak boleh disangkal di bawah bahagian kedua s 340(1) KTN. Mahkamah perlu menentukan terma dan syarat perjanjian cagaran antara penggadai dan pemegang gadaian. Perlu wujud pelanggaran perjanjian cagaran oleh penggadai dan pemegang gadaian akan menyerahkan satu notis kepada penggadai untuk meremedikan perkara tersebut melalui Borang 16D atau Borang 16E. Sekiranya ianya tidak diremedi dalam masa yang ditetapkan keseluruhan jumlah yang dicagarkan akan perlu dibayar kepada pemegang gadaian dan pemegang gadaian boleh memfailkan tindakan gadaian dan memohon untuk satu perintah untuk menjual terhadap tanah yang dicagarkan yang perlu mematuhi A 83 Kaedah-Kaedah Mahkamah 2012 (lihat perenggan 18).

(2) Untuk menghalang satu perintah untuk menjual diberikan, penggadai mempunyai beban untuk memuaskan mahakamh bahawa wujud sebab sebaliknya sepertimana dimaksudkan oleh s 256(3) KTN yang mana wujud tiga kategori iaitu: (a) gadaian tersebut boleh disangkal di bawah s 340(2)(a)–(c) dan 4(b) KTN; (b) cagaran telah gagal untuk mematuhi prasyarat untuk pemfailan tindakan cagaran; dan (c) perintah untuk menjual tanah yang dicagar bertentangan dengan kedaulatan undang-undang atau ekuiti. Sekiranya pencagar tidak boleh melepaskan beban tersebut, mahkamah akan memerintahkan perintah penjualan

berkenaan dengan tanah yang dicagar (lihat perenggan 18).

(3) Tiada keperluan KTN untuk Borang 16D untuk mematuhi dengan perenggan 8A kerana perenggan 8A terpakai untuk surat cara urusan, dan Borang 16D tidak perlu untuk memenuhi keperluan akusaksi dan oleh itu tidak boleh menjadi satu surat cara urusan. Walaupun andaian dibuat bahawa perenggan 8A terpakai kepada Borang 16D, ketidakpatuhan dengan perenggan 8A tidak mempunyai apa-apa kesan (lihat perenggan 26–27).]

Notes

For cases on order for sale, see 8(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 2917–3094.

Cases referred to

Bank Bumiputra Malaysia Bhd v Mahmud bin Haji Mohamed Din (Datin Hajjah Salma bte Md Jamin, intervener) [1989] 1 MLJ 381; [1989] 1 CLJ Rep 326, HC (refd)

Chan Boi Loi v Public Bank Bhd and another application [2011] 1 MLJ 478, FC (folld)

China and South Sea Bank Ltd v Tan [1989] 3 All ER 839, PC (refd)

Jacob v Oversea-Chinese Banking Corporation, Ipoh [1974] 2 MLJ 161, FC (refd)

Jambatan Merah Sdn Bhd v Public Bank Berhad [2014] 1 LNS 1657, HC (refd)

Jetara Sdn Bhd v Maju Holdings Sdn Bhd [2007] 3 MLJ 609; [2007] 3 CLJ 41, CA (folld)

Keng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd & Anor [1989] 1 MLJ 457, PC (refd)

Lesco Development Corp Sdn Bhd v Malaysia Building Society Bhd [1988] 2 MLJ 184, SC (refd)

Low Lee Lian v Ban Hin Lee Bank Bhd [1997] 1 MLJ 77, SC (folld)

Nira Sdn Bhd v Malayan Banking Bhd [1990] 1 MLJ 110, SC (refd)

Syarikat Kewangan Melayu Raya Bhd v Malayan Banking Bhd [1984] 1 MLJ 115, FC (refd)

Tenaga Nasional Bhd v Api-Api Aquaculture Sdn Bhd [2015] MLJU 2359; [2015] 3 AMR 811, HC (refd)

Wong Hon Leong David v Noorazman bin Adnan [1995] 3 MLJ 283; [1995] 4 CLJ 155, CA (folld)

Legislation referred to

Companies Act 1965 s 176

Interpretation Acts 1948 and 1967 ss 2(1), 2(1)(a) (1)(b), (1)(c), (1)(d), (1)(e), 62, 65(2), 71, Parts 1, 2

Interpretation Acts 1967 (now Interpretation Acts 1948 and 1967) s 62

National Land Code ss 5, 205(1), 206(1)(a), 207, 208, 209, 210, 211,

A 211(1), 212, 243, 249, 250, 251, 253(1), 254(1), (1)(a), (1)(b), (1)(c), (3)(a), (3)(b), 255(1), 256(2), (3), 340(1), (2)(a), (2)(b), (2)(c), (4)(b), Division IV, Part Fourteen, Part Fifteen, Part Sixteen, Part Seventeen, First Schedule, Fifth Schedule, Tenth Schedule, paras 1, 2, 3, 4, 5, 6, 7, 8, 8A, 9, 10, 11, Forms 16A, 16D, 16E

B Rules of Court 2012 O 1A, O 2 r 1(3), O 83

Tan Gian Chung (Cheah Faan Jin with him) (Shook Lin & Bok) for the plaintiff. Navpreet Singh (Ranjit Singh & Yeoh) for the defendant.

C **Wong Kian Kheong J:**

BACKGROUND

[1] Twelve financial institutions ('FI's') had granted facilities to the defendant company ('the defendant'). The defendant had incurred debts to various creditors, including the FI's ('initial debt'). Due to the defendant's inability to settle the initial debt, it underwent a scheme of arrangement under the then s 176 of the Companies Act 1965 ('arrangement scheme').

E **[2]** Pursuant to the arrangement scheme, with regard to the initial debt, the defendant issued 'Redeemable Convertible Secured Loan Stocks' ('RCSLS') with a nominal value of RM120m to its secured creditors ('RCSLS holders'). The RCSLS holders consist of, among others, the FI's.

F **[3]** The RCSLS were repayable by the defendant to the RCSLS holders on certain maturity dates ('repayment'). The repayment was secured by, among others, charges registered under the National Land Code ('the NLC') over various pieces of land owned by, among others, the defendant ('security'). This case concerns part of the security in the form of a NLC charge registered on
G 24 December 2017 ('charge') in favour of the plaintiff company ('trustee') over the defendant's three lots of land ('three lots') held under the following titles:

(a) HSD 225989, PT 142;

(b) HSD 225990, PT 143; and
H

(c) HSD 226003, PT 156;

[4] The defendant and the trustee had executed, among others, a security trust deed on 6 November 2006 wherein the trustee had been appointed to act
I as a security trustee holding the security for the benefit of all the RCSLS holders ('security trust deed').

[5] The defendant defaulted in making the repayment on the dates stipulated in the RCSLS.

[6] On 11 July 2013, the defendant, trustee and RCSLS holders entered into a consent judgment in Kuala Lumpur High Court Civil Suit No 22NCC-778–05 of 2015 regarding the outstanding sum due under the RCSLS ('first outstanding sum') by the defendant to the FI's ('consent judgment'). According to the consent judgment, among others:

(a) final judgment in respect of the first outstanding sum was entered against the defendant in favour of the FI's; and

(b) the first outstanding sum was to be paid by the defendant to the FI's on certain dates.

[7] The defendant failed to pay the first outstanding sum pursuant to the consent judgment.

[8] On 5 March 2015, the defendant, trustee, FI's, Dual Vest (M) Sdn Bhd ('DV') and Awal Kelana (M) Sdn Bhd ('AK') entered into a settlement agreement ('settlement agreement'). The settlement agreement provided that, among others, the defendant, DV and AK would settle the first outstanding sum and expenses incurred by the FI's ('settlement sum') on 19 December 2015 ('settlement completion date') in the following manner:

(a) sale of certain properties ('tranche sale properties'); and/or

(b) redemption of certain properties ('redemption properties').

[9] The defendant, DV and AK breached the settlement agreement by, among others, not completing the sale of the tranche sale properties and redemption of the redemption properties ('breaches of settlement agreement'). The trustee issued notices to the defendant, DV and AK to remedy the breaches of settlement agreement. However, the breaches of settlement agreement were not remedied and the trustee issued notices to the defendant, DV and AK to terminate the settlement agreement ('termination').

[10] After the termination, the following suits, among others, have been filed:

(a) Kuala Lumpur High Court Civil Suit No WA-22NCC-125–04 of 2018 ('Suit 125') has been instituted by the defendant against the trustee and Malayan Banking Bhd ('MBB') to, among others, restrain MBB from presenting any petition to wind up the defendant; and

(b) Kuala Lumpur High Court Civil Suit No WA-22NCC-126–04 of 2018 ('Suit 126') is filed by, among others, the defendant, DV and AK against, among others, the trustee and FI's to set aside, among others, the consent judgment and settlement agreement.

[11] Suits 125 and 126 ('KL Suits') have been ordered to be heard together and are still pending.

[12] In this originating summons ('OS'), the trustee enforces the charge and applies for an order of sale of the three lots pursuant to s 256(2) of the NLC.

ISSUES

[13] The following questions arise in this OS:

(a) whether the OS should be dismissed on the ground that the KL Suits are still pending. In this respect, there are conflicting decisions of our highest court; and

(b) if the OS is not dismissed on the ground that the KL Suits are still pending:

(i) what is the approach to be taken by the court in a charge action?

(ii) whether the trustee has established the defendant's breach of the charge agreement between the defendant and trustee ('charge agreement'); and

(iii) if the defendant has breached the charge agreement, whether the defendant has satisfied the court that there exists a 'cause to the contrary' under s 256(3) of the NLC. In this regard, the defendant has raised a novel contention that Form 16D (sent by the trustee to the defendant pursuant to s 254(1) of the NLC) should comply with para 8A of the Tenth Schedule to the NLC ('para 8A').

TERMINOLOGY

[14] Learned counsel for the trustee and defendant have used the term 'foreclosure' in this OS. At the expense of being punctilious, the term 'foreclosure' concerns a common law mortgage and not a NLC charge. It was decided in *Jambatan Merah Sdn Bhd v Public Bank Berhad* [2014] 1 LNS 1657 at paras 26–27, as follows:

> 26. *The RC and its predecessor, the Rules of the High Court 1980 (RHC), are based on the English Supreme Court Rules 1965 (SCR). The SCR used the terms 'redemption' and 'foreclosure' for mortgages under English land law. Our NLC however uses the phrases 'discharge of charge' (please see ss 245 and 278 to 280 NLC) and 'order for sale' (please see ss 253–269 NLC) for charges registered under the NLC.*
>
> 27. *I am of the respectful view that Order 83 RC should be amended by the Rules Committee to be consistent with the NLC in respect of a chargee's remedy to apply for an 'order for sale' of the charged land (not to 'foreclose') and chargor's right to discharge the charge (not to 'redeem'). I rely on the following decisions of our apex court regarding our land legislation which embodies the Torrens system:*

(a) the opinion of the Privy Council in *Haji Abdul Rahman & Another Appellant v Mohamed Hassan* [1917] AC 209, at 216–217, given by Lord Dunedin, on an appeal from the Federated Malay State of Selangor regarding the Registration of Title Regulations 1891 of Selangor (a Torrens legislation):

> *It seems to Their Lordships that the learned judges, in these observations, have been too much swayed by the doctrines of English equity, and not paid sufficient attention to the fact that they were here dealing with a totally different land law, namely, a system of registration of title contained in a codifying enactment. The very phrase 'equity of redemption' is quite inapplicable in the circumstances. There is no provision in the [Registration of Title Regulations 1891 (Selangor)] for mortgages apart from what is described as a 'charge'; indeed, they are, except as regards those of the past, de facto abolished after the date of the enactment by s 4 already quoted. That provides for charges, which must be made in a statutory form and must appear on the register to be effective. Under such a system the right to the land remains with the registered owner. He has nothing to redeem, his right on paying the debt being to have the charge cleared off the register.* (Emphasis added.)

(b) the Supreme Court's judgment in *Malayan United Finance Bhd v Tay Lay Soon* [1991] 1 MLJ 504 at p 507, delivered by Jemuri Serjan CJ (Borneo) as follows:

> *It certainly would avoid confusion if the term equity of redemption should not be used at all in dealing with a charge under the [NLC] because in other jurisdictions, besides England, it conveys an entirely different idea. For instance, in New South Wales, Australia, it was used in a different sense altogether. In Abigail v Lapin* [1934] AC 491 *at p 500 Lord Wright explained that the Real Property Act 1900, New South Wales, embodied the Torrens system of registration of title to land, not of deeds and of mortgages. …*
>
> It thus can be appreciated that the equity of redemption as is known in England which is in the nature of a right bears no similarity in idea and effect with the equity of redemption in New South Wales, Australia, where a mortgage is closely analogous to a charge under our [NLC], but in practice, coupled with a transfer of the legal title as well and where the equity of redemption is not a right but has grown out of practice. *'Equity of redemption' is a misnomer but persistence in its use is not a matter of law but of habit in Australia and in Malaysia it does not exist at all, either in the sense as understood in English law or in Australia, at least in New South Wales.*
>
> *Under the [NLC] the interest in the land subject to a charge does not vest in the chargee but, upon registration of a charge, it renders the land subject to the charge liable as a security only in accordance with the provisions of the charge, express or implied (s 243)*. Under s 244(1), the chargee is entitled to the custody of the issue document of title so long the liability stays under the charge. There is no statutory provision for the discharge of the charge by the chargor but his right and that of a borrower to do so is embodied in the provisions of the charge itself. See cl 3(ii) of the annexure to the charge and s 249(1) [NLC]. However, under s 266(1) any chargor may at any time before the conclusion of a judicial sale of a charged land tender the amounts due to the Registrar of the court or the Collector and the amount sufficient to cover all expenses. (Emphasis added.); and

(c) the dissenting judgment of Abdul Hamid Mohamad FCJ (as His Lordship then was) in the Federal Court case of *Perwira Habib Bank Malaysia Bhd v Lum Choon Realty Sdn Bhd* [2005] 4 CLJ 345 at pp 361, 362 and 363–364, as follows:

> Before considering the provisions in detail, perhaps something should be said about the background of (Order 83 RHC). This order was taken from O 83 of the Rules of the High Court 1970 (Singapore) which was in turn taken from O 88 of the Rules of the Supreme Court 1965 (England). ...
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> *As a result of the adoption of the English rules by changing only the word and words related to the word 'mortgage' with the word and words related to the word 'charge', we find that such words as 'redeem', 'redemption', 'foreclosure', 'reconveyance', 'equitable charge' are still retained in the Malaysian rules. They are actually out of place. ...*
>
> *Regarding the word 'equitable charge' in r 1(2) of O 83, the question is, is there such a thing in our land law? Is it not contrary to the term 'charge' as provided in the NLC? If there is such a thing as an 'equitable charge' and since it is not a 'charge' under the NLC could the remedies provided in the NLC be made available in relation to such a 'charge'?* The former Federal Court in *Mahadevan s/o Mahalingam v Marilal & Sons (M) Sdn Bhd* [1984] 1 CLJ 286; [1984] 1 CLJ Rep 230 seems to think that our law recognize 'equitable charge'. But, the court was actually interpreting the words 'mortgage or other charge' in s 2(1) of the Limitation Act 1953, an Act passed prior to the NLC and the cases relied on were pre-NLC cases. Thus Teo Keong Sood and Khaw Lake Tee commented at p 233 '... it is doubtful what His Lordship meant by the term 'equitable charge'. I shall say no more on this.
>
> *'Redemption' is another misplaced term used in O 83. ... So is 'reconveyance'. ...*
>
> *As a result, such English land law terms are being used interchangeably but erroneously with the terms used in the NLC: 'mortgage' for 'charge', 'foreclosure' for 'order for sale', 'redemption' for 'discharge' etc. leading to confusion as they have different legal meanings. In my view, to avoid confusion, it is better that we stick to the terms used in the NLC 1965 and ignore those English land law terms even though they are used in O 83. O 83 is not land law and it cannot override or add to the provisions of the NLC regarding substantive land law.* (Emphasis added.)

SHOULD THE OS BE DISMISSED BECAUSE OF PENDING KL SUITS?

[15] Mr Navpreet Singh, learned counsel for the defendant, relies on the Supreme Court's judgment delivered by Wan Hamzah SCJ in *Lesco Development Corp Sdn Bhd v Malaysia Building Society Bhd* [1988] 2 MLJ 184 as follows:

(a) in *Lesco Development Corp*:

(i) the appellant company had charged its land to the respondent company to secure a loan granted by the latter to the former;

(ii) the respondent company filed a suit against the respondent

company and its guarantors to recover the outstanding sum due to the respondent company under the loan ('debt recovery suit'). In the debt recovery suit:

(1) the respondent company had obtained a judgment in default of appearance against the appellant company ('JID'); and

(2) the appellant company applied to the court to set aside the JID. This application was still pending; and

(iii) the respondent company filed an application for an order of sale of the charged land. The High Court ordered the sale of the charged land but this was reversed by the Supreme Court on the following ground, at p 185:

> *It is undesirable to allow a situation where two different courts would try and determine the same issues arising between the same parties relating to the same subject matter. As MBS had chosen to sue Lesco in the Commercial Division before filing the originating summons and there was already default judgment in the suit and the application to set aside the default judgment is still pending, in our opinion the hearing of the originating summons should have been postponed until final disposal of the suit in the Commercial Division. Therefore we order that the order of sale be set aside. We further order that the originating summons be dealt with after the final disposal of the suit, and that appropriate orders should be made on the originating summons taking into consideration the result of the suit.* (Emphasis added.)

(b) based on *Lesco Development Corp*, Mr Navpreet Singh prays for this OS to be dismissed with costs.

[16] With respect, I am unable to accede to the above submission due to the following reasons:

(a) *Lesco Development Corp* had been decided by our then apex court. There are however two subsequent Federal Court judgments which have decided to the contrary ('two Federal Court judgments'). The two Federal Court judgments are as follows:

(i) Gopal Sri Ram JCA (as he then was) held as follows in *Low Lee Lian v Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77 at p 93:

> *Now, it is trite that a chargee/creditor may pursue any or all remedies to recover monies lent by him. He may enforce his statutory charge against the chargor by way of proceedings in rem under s 256 of the Code. He may sue the principal debtor (who may or may not be the chargor) upon the personal covenant contained in any loan agreement that was entered into between the parties. He may proceed against the surety who has guaranteed the loan. And he may pursue all of these courses simultaneously, contemporaneously or successively. See China and South Sea Bank Ltd v Tan* [1989] 3 All ER

839 at p 842. (Emphasis added.); and

(ii) in *Chan Boi Loi v Public Bank Bhd and another application* [2011] 1 MLJ 478, at para 8, Gopal Sri Ram FCJ decided as follows:

> [8] *We would reiterate that a lender is entitled to pursue all remedies available against a borrower simultaneously, contemporaneously or successively to recover the money lent unless there is an agreement to the contrary.* (Emphasis added.);

(b) the two Federal Court judgments have decided that a chargee/creditor may enforce a NLC charge simultaneously, contemporaneously or successively with the right of the chargee/creditor to recover the debt due from the charger/debtor to the chargee/creditor; and

(c) when there are conflicting decisions by our appellate courts, the High Court may choose which decision to follow — please see *Tenaga Nasional Bhd v Api-Api Aquaculture Sdn Bhd* [2015] MLJU 2359; [2015] 3 AMR 811, at para 84. With respect, I follow the two Federal Court judgments because the approach adopted therein is consistent with the position in other Common Law countries. The position in other Common Law jurisdictions is explained by Lord Templeman in an appeal to the Privy Council from Hong Kong, *China and South Sea Bank Ltd v Tan* [1989] 3 All ER 839 at p 842:

> *The creditor had three sources of repayment. The creditor could sue the debtor, sell the mortgage securities or sue the surety. All these remedies could be exercised at any time or times simultaneously or contemporaneously or successively or not at all.* (Emphasis added.)

In the borderless world of trade and commerce, Malaysian case law should, as far as possible, be consistent with the law of other countries, especially those who share the Common Law heritage.

APPROACH IN DECIDING A CHARGE ACTION

[17] Section 256(3) of the NLC reads as follows:

> *On any such application, the Court shall order the sale of the land or lease to which the charge relates unless it is satisfied of the existence of cause to the contrary.* (Emphasis added.)

[18] Based on my understanding of the relevant NLC provisions and case law, I adopt the following approach to decide this OS:

(1) a registered charge is indefeasible under the second limb of s 340(1) of the NLC. Section 340(1) of the NLC provides as follows:

340 *Registration to confer indefeasible* title or *interest, except in certain circumstances*

(1) *The* title or *interest of any person or body for the time being registered* as proprietor of any land, or *in whose name any* lease, *charge* or easement *is for the time being registered, shall, subject to the following provisions of this section, be indefeasible*. (Emphasis added.)

(2) the court should ascertain the terms and conditions of the charge agreement between the chargor and chargee. In this regard, I highlight ss 243 and 253(1) of the NLC as follows:

243 *Effect of charges*

Every charge created under this Act shall take effect upon registration so as to render the land or lease in question liable as security in accordance with the provisions thereof, express or implied.

253 *Purpose and scope of this Chapter*

(1) *The provisions of this Chapter shall have effect for the purpose of enabling any chargee to obtain the sale of the land or lease to which his charge relates in the event of a breach by the chargor of any of the agreements on his part expressed or implied therein.* (Emphasis added.)

Sections 249–251 of the NLC provide for terms to be implied into the charge agreement;

(3) there must be a breach of the charge agreement by the chargor ('chargor's breach') — please see the Supreme Court's judgment delivered by Gunn Chit Tuan SCJ (as he then was) in *Nira Sdn Bhd v Malayan Banking Bhd* [1990] 1 MLJ 110 at pp 111–112;

(4) when there is a chargor's breach, the chargee shall serve a notice to the chargor to remedy the chargor's breach in:

(i) Form 16D (please see s 254(1)(a)–(c) of the NLC); or

(ii) Form 16E (please refer to s 255(1) of the NLC),

within one month of the date on which Form 16D or Form 16E is served;

(5) if the chargor's breach is not remedied within the time stipulated in Form 16D or Form 16E:

(i) the entire sum secured by the charge shall become due and payable to chargee (s 254(3)(a) of the NLC (for Form 16D)); and

(ii) the chargee may file a charge action and apply for an order for sale of the charged land (s 254(3)(b) of the NLC (for Form 16D) and s 255(1) of the NLC (for Form 16E));

(6) the charge action should comply with O 83 of the Rules of Court 2012

('the RC') — *Low Lee Lian* at p 88. This is clear from s 256(2) NLC which provides that a charge action 'shall be made to the Court in accordance with the provisions in that behalf of any law for the time being in force relating to civil procedure'.

Order 1A of the RC provides that all rules in RC (including O 83 of the RC) shall be administered with regard to the 'overriding interest of justice'. Any non-compliance with O 83 of the RC may be cured by the court under O 2 r 1(3) of the RC if such a non-compliance has not caused any injustice to the chargor;

(7) once the chargee has fulfilled the above sub-paras (3)–(6), the chargor has the burden to satisfy the court that there is a 'cause to the contrary' within the meaning of s 256(3) of the NLC and consequently, the court should not order a sale of the charged land. I rely on the following opinion of the Privy Council delivered by Lord Oliver in *Keng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd & Anor* [1989] 1 MLJ 457 at p 460 (an appeal from Malaysia):

> *Section 256(3) of the National Land Code is mandatory. The court 'shall' order a sale unless it is satisfied of the existence of 'cause to the contrary'. Granted that these words have been construed in Malaysia as justifying the withholding of an order where to make one would be contrary to some rule of law or equity, they clearly cannot extend to enabling the court to refuse relief simply because it feels sorry for the borrower or because it regards the lender as arrogant, boorish or unmannerly.* (Emphasis added.); and

(8) according to *Low Lee Lian* at pp 82–85, there are three categories of 'cause to the contrary' as follows:

(i) the charge is defeasible under s 340(2)(a)–(c) and (4)(b) ('first category');

(ii) the chargee has failed to comply with the conditions precedent for the filing of a charge action ('second category'); and

(iii) an order for sale of the charged land is contrary to a rule of law or equity ('third category');

if the chargor cannot discharge the onus to satisfy the court of the existence of any one of the first, second or third category, the court 'shall' order the sale of the charged land under s 256(3) of the NLC.

HAS THE DEFENDANT BREACHED CHARGE AGREEMENT?

[19] The charge agreement provides as follows:

(a) Form 16A stated that the three lots were charged to secure the defendant's payment of RM120m together with interest to the trustee (who acts on behalf of the RSCLS holders) as provided in the annexure to Form 16A ('charge annexure'); and

(b) the charge annexure provided, among others:

(i) in cl 2.1 ('cl 2.1'), the defendant 'shall on demand' pay to the trustee an amount equivalent to the value of the three lots realisable upon sale of the three lots, the 'Secured Amounts' (defined in cl 1.2 as the nominal amount of RCSLS and among others, all interest, payable by the defendant under the 'Financing Agreements'). Clause 1.2 of the charge annexure has defined 'Financing Agreements' as the agreements set out in the security trust deed; and

(ii) cl 6.1(a) states that if the defendant breaches the charge annexure, the entire secured amounts 'shall become immediately due and payable' (cl 6.1(a)).

[20] I am satisfied that the defendant has breached the charge agreement ('the defendant's breach') as follows:

(a) the trustee's solicitors sent a demand dated 11 July 2016 to the defendant ('demand') which stated, among others:

(i) the defendant had defaulted in payments to RCSLS holders under the consent judgment and settlement agreement;

(ii) as at 27 April 2016, the outstanding sum due from the defendant to RCSLS holders was RM107,699,114.80 (outstanding sum (demand)); and

(iii) the trustee demanded the defendant to pay the outstanding sum (demand) to the trustee within seven days from the date of the demand and if the defendant failed to do so, the trustee 'shall be compelled to forthwith enforce' the charge;

(b) the defendant did not pay the outstanding sum (demand) to the trustee within the time period stipulated in the demand. In fact, the defendant did not pay any sum to the trustee. Accordingly, the defendant has breached the charge agreement within the meaning of cll 2.1 and 6.1(a); and

(c) the defendant did not deny the demand at any time. In a commercial relationship, when one party does not deny another party's claim that a debt is due from the former to the latter, the former's failure may support the inference that the debt is actually due. I rely on the following two Court of Appeal judgments:

(i) the judgment of Gopal Sri Ram JCA (as he then was) in *Wong Hon Leong David v Noorazman bin Adnan* [1995] 3 MLJ 283; [1995] 4 CLJ 155 at p 159; and

(ii) Hasan Lah JCA's (as he then was) decision in *Jetara Sdn Bhd v Maju Holdings Sdn Bhd* [2007] 3 MLJ 609; [2007] 3 CLJ 41 at p 55.

[21] On 15 August 2016, in view of the defendant's breach, the plaintiff's solicitors served Form 16D on the defendant. The Form 16D stated that if the defendant's breach was not remedied within one month from the date of service of Form 16D, the trustee would apply for an order for sale of the three lots. The defendant's breach was not rectified within the one-month period stipulated in Form 16D. Nor was the defendant's breach remedied at any time. Furthermore, the defendant did not reply at all to Form 16D.

[22] Mr Navpreet Singh contended that the termination was unlawful because the defendant had not breached the settlement agreement. I am not able to accept this submission because:

(a) cl 1.1 of the settlement agreement ('cl 1.1') has defined a 'Nominated Party' as a person nominated by the defendant to exercise the 'Right of First Refusal' ('ROFR') as referred to in cl 8.1 of the settlement agreement ('cl 8.1');

(b) 'SPA' is defined in cl 1.1 as each sale and purchase agreement for the sale of a 'Sale Asset'. According to cl 1.1, 'Sale Asset' means the tranche sale properties and redemption properties;

(c) based on cl 1.1, 'Deposit' means the deposit payable in respect of a sale of any tranche sale property which shall be a sum equal to 10% of the purchase price for such tranche sale property;

(d) cl 15.1(d) of the settlement agreement ('cl 15.1(d)') has provided that the trustee 'shall ... issue a written notice ... declaring an Event of Default' when the nominated party fails to execute the SPA or pay the deposit or any part thereof on the 'due date';

(e) the tranche sale properties were to be sold by the settlement completion date. According to cl 1.1, the settlement completion date was 19 December 2015;

(f) cl 7.1 of the settlement agreement stated that the defendant 'shall' redeem the redemption properties on or before 10 June 2015;

(g) the defendant had breached cl 15.1(d) as follows:

(i) the nominated party had failed to execute the SPA on the following due dates ('due dates'):

(1) 19 December 2015 (regarding the tranche sale properties); and/or

(2) 10 June 2015 (in respect of the redemption properties);

(ii) the nominated party had failed to pay the deposit on the due dates; *or*

(iii) the nominated party had failed to pay any part of the deposit on the due dates; and

(h) if the termination was unlawful, the defendant should have replied as such to the demand and Form 16D. Such a failure on the defendant's part indicates that the defendant's complaint regarding the unlawfulness of the termination is an afterthought.

[23] KPMG Deal Advisory Sdn Bhd had been appointed by the defendant, DV and AK as an 'Independent Agent' ('IA') under cl 4.1 of the settlement agreement ('cl 4.1'). It was submitted on behalf of the defendant that when the nominated party failed to pay the requisite earnest deposit, the IA should have sold the tranche sale properties pursuant to cl 8.3 of the settlement agreement ('cl 8.3'). As such, the defendant alleges that the trustee has breached cl 8.3. I accept the submission of the trustee's learned counsel, Mr Tan Gian Chung, and find that the trustee has not breached cl 8.3. This decision is based on the following reasons:

(a) cl 8.2 of the settlement agreement states that upon service of a ROFR notice on the nominated party by the IA, the nominated party shall have seven business days to exercise the ROFR ('exercise period');

(b) cl 8.3 provides that if no written offer from the nominated party together with the payment of the requisite earnest deposit is received by the IA for the tranche sale property within the exercise period or if the price offered by the nominated party does not comply with cl 8.1, the IA shall immediately thereafter be entitled to sell the tranche sale property to the 'Successful Offeror' as may be approved by the 'Majority of FI Holders';

(c) according to cl 1.1, the 'Majority of FI Holders' means the FI's holding more than 50% in value of the aggregate nominal value of the RCSLS. Clause 1.1 has defined a 'Successful Offeror' as an offeror whose offer to purchase a tranche sale property is accepted by the IA and approved by the majority of FI holders;

(d) it is clear from cl 8.3 and the definition of a 'Successful Offeror' in cl 1.1 that any offeror who offers to purchase a tranche sale property ('offeror') has to be approved by the majority of FI holders. Accordingly, there cannot be a breach of cl 8.3 when firstly, there is no offeror and secondly, the offeror has not been approved by the majority of FI holders;

(e) additionally or alternatively, the IA is appointed by the defendant, DV and AK under cl 4.1. The trustee did not appoint the IA. Consequently, even if the IA has breached cl 8.3, the defendant, DV and AK (not the trustee) should be responsible for such a breach; and

(f) the defendant did not reply to the demand and Form 16D by relying on cl 8.3. Such a fact shows that the defendant's reliance on cl 8.3 is an afterthought.

A SHOULD FORM 16D COMPLY WITH PARA 8A?

[24] Paragraph 8A provides as follows:

> *All entries in the Schedule to a form shall be completed by a horizontal line drawn immediately after the last line of such entries; and the rectangle so formed, being the rectangle enclosing the remaining space in the Schedule shall be transversed by a diagonal line joining the two opposite angles of the rectangle; and the words denoting the number of title or titles affected by the dealing shall be written on the said diagonal line. The said horizontal line, the said diagonal line and the said works shall be duly initialed by the said person attesting the instrument.* (Emphasis added.)

[25] Mr Navpreet Singh submits that the Form 16D in this case has failed to comply with para 8A. Hence, the defendant has established the second category as explained in *Low Lee Lian* and this OS should be dismissed with costs.

[26] I am of the view that there is no requirement in the NLC for Form 16D to comply with para 8A because:

(a) para 8A applies to an 'instrument' of 'dealing' (not Form 16D). This is clear from para 1 of the Tenth Schedule to the NLC ('Tenth Schedule') which provides that 'form' in paras 1–11 (including para 8A) of the Tenth Schedule means a form specified in the First Schedule to the NLC in relation to a 'dealing'. Section 5 of the NLC defines a 'dealing' as 'any transaction with respect to alienated land effected under the powers conferred by Division IV' of the NLC ('Division 4'). Form 16D is not an 'instrument' of 'dealing' under s 5 of the NLC read with Division 4;

(b) s 205(1) of the NLC states that the dealings capable of being effected under NLC 'with respect to alienated lands and interests therein shall be those specified in Parts Fourteen to Seventeen, and no others'. Clearly, Form 16D is not an 'instrument' of 'dealing' according to s 205(1) of the NLC; and

(c) s 206(1)(a) of the NLC requires every 'instrument' of 'dealing' to comply with ss 207–212 of the NLC. According to s 211(1) of the NLC, 'every execution by a natural person of any instrument effecting any dealing under [NLC] shall be attested in accordance with the following provisions of this section by one of the officers or other persons specified in that behalf in the Fifth Schedule' to the NLC ('attestation requirement'). Form 16D does not have to fulfill the attestation requirement and cannot therefore be an 'instrument' of 'dealing'.

[27] Even if it is assumed that para 8A applies to Form 16D, I find that the non-compliance of para 8A by Form 16D in this case ('non-compliance') is of

no consequence. I decide as such due to the following reasons: A

(a) the NLC does not fall within s 2(1)(a)–(e) of the Interpretation Acts 1948 and 1967 ('the IA (1948 and 1967)'). Hence, Part 1 of the IA (1948 and 1967) does not apply to the NLC — please see s 2(1) of the IA (1948 and 1967). Part 2 of the IA (1948 and 1967) applies to the NLC — please see s 65(2) of the IA (1948 and 1967). Section 71 of the IA (1948 and 1967) (which is in Part 2 of the IA (1948 and 1967)) provides as follows: B

> 71 Forms
>
> *Save as is otherwise expressly provided, whenever forms are prescribed slight deviations therefrom, not affecting the substance or calculated to mislead, shall not invalidate them.* (Emphasis added.) C

(b) despite the non-compliance, Form 16D in this case is validated by s 71 of the IA (1948 and 1967). This was because the non-compliance was only a 'slight deviation' which: D

(i) did not affect the substance of Form 16D; and

(ii) was not calculated to mislead the defendant. I could not see how the defendant was or could be misled by the non-compliance when the defendant had filed a lengthy affidavit and two written submission to oppose this OS; and E

(c) Part 1 of the IA (1948 and 1967) consists of, among others, the previous Interpretation Act 1967 ('the IA (1967)'). Part 1 of the IA (1948 and 1967) contains s 62 which provides as follows: F

> *Deviation from forms Any written law prescribing a form shall be deemed to provide that an instrument or other document purporting to be in that form shall not be invalidated by reason of any deviation from the form if the deviation has no substantial effect and is not calculated to mislead.* (Emphasis added.)

G

The following cases have applied s 62 of the IA (1967) to validate Form 16D:

(i) the judgment of Suffian LP in the Federal Court case of *Jacob v Oversea-Chinese Banking Corporation, Ipoh* [1974] 2 MLJ 161 at p 163; H

(ii) the Federal Court's judgment delivered by Mohamed Azmi FJ in *Syarikat Kewangan Melayu Raya Bhd v Malayan Banking Bhd* [1984] 1 MLJ 115 at pp 117–118; and

(iii) the decision of Peh Swee Chin J (as he then was) in the High Court case of *Bank Bumiputra Malaysia Bhd v Mahmud bin Haji Mohamed Din (Datin Hajjah Salma bte Md Jamin, intervener)* [1989] 1 MLJ 381; [1989] 1 CLJ Rep 326 at p 327. I

Section 62 of the IA (1967) (now s 62 of the IA (1948 and 1967)) is

substantially similar to s 71 of the IA (1948 and 1967). As such, the above cases concerning s 62 of the IA (1967) apply to validate Form 16D in this case.

THE COURT'S DECISION

[28] Premised on the above evidence and reasons whereby the defendant cannot establish the existence of the first, second and third categories, this OS is allowed with costs.

Originating summons allowed with costs.

Reported by Izzat Fauzan